

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
Seeks Comment on the Commission's Rules Relating to)	
High-Cost Universal Service Support and the ETC)	
Designation Process)	

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
REPLY COMMENTS**

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

L. Marie Guillory
Daniel Mitchell
Jill Canfield

Its Attorneys

4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
(703) 351-2000

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SUMMARY

The Board should recommend that the Commission take a fresh look at the principles that it must consider in developing rules to maintain and preserve universal service. The promotion of comparable rates and services between rural, high cost and urban areas is foremost among these principles. The Commission should refocus its attention to the achievement of this goal and remedy rules that are not likely to promote the goals of the Act and may, in the long term, result in the deterioration of services in rural and high-cost areas.

The majority of the parties with an interest in this proceeding recognize that FCC rules governing the high-cost support mechanisms have led to unintended consequences that could adversely affect the maintenance of universal service over the long term. Rules designed to promote competitive neutrality among providers and technologies are actually creating advantages for providers and technologies that have lower cost structures and fewer burdens than the ILECs on whose costs these providers support is based. Rules providing for the use of the ILEC's embedded costs permit the Commission to rely on the regulatory regime to ensure compliance with the requirements of the Act. While existing rules permit the Commission to determine that the Act's requirements are being met by these providers, in cases where unregulated providers receive support on the basis of the ILECs cost, the rules do not permit the Commission to determine whether support is "sufficient" for purposes of the Act or whether it is used for the purposes intended. The Joint Board should look at ways to remedy this situation by recommending rule changes that establish a measure of support for competitive ETCs on the basis of the ETC's own costs.

The Joint Board should tackle the difficult issues in this proceeding and make substantive recommendations for change. The status quo is unacceptable and should not be prolonged by

efforts to force a task force resolution or a consensus on the many parties with an interest in the resolution of the issues. The existing escalation in the growth of the fund and the distortions created by the rules have a stifling effect on companies that have traditionally served and invested heavily in the infrastructure needed to serve rural and high-cost areas of the United States. The Board should act to alleviate uncertainties in this market place by recommending interim safeguards that can be put in place to prevent further disruption and uncertainty during the pendency of this proceeding. It should recommend that all pending ETC applications before the FCC be stayed until the issues in this proceeding are decided.

A large number of the parties accept the notion that carriers build networks to provide the supported services and that universal service will suffer if support is isolated on the basis of service to primary lines. The Board should recommend that the rules on support for all lines remain in place. It is necessary to retain these rules to promote the building of networks that continue to provide quality services and that will allow for the evolution of the definition of universal service to include other services besides the existing supported services.

Finally, the Joint Board should recommend that the Commission and the states use relevant and meaningful criteria in deciding ETC designations in areas served by rural telephone companies. The Act requires a separate finding of the public interest before additional carriers are designated in these areas. The Joint Board should suggest that the Commission reverse the Wyoming decision and other cases in which it equated the public interest with the addition of a competitive ETC.

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**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
REPLY COMMENTS**

The National Telecommunications Cooperative Association (NTCA)¹ hereby files its reply comments with the Federal Communications Commission (Commission or FCC and the Federal-State Joint Board on Universal Service (Joint Board) in the above-captioned proceeding.²

I. THE RULES SHOULD BE REEXAMINED TO ENSURE THAT UNIVERSAL SERVICE PRINCIPLES IN SECTION 254(b)(1) THROUGH (6) ARE NOT SUBSERVIENT TO THE ADDITIONAL "COMPETITIVE NEUTRALITY" PRINCIPLE ADOPTED BY THE COMMISSION.

The intended purpose of universal service is to allow all Americans access to affordable and comparable telecommunications services.³ Specifically, Section 254(b)(3) states that consumers in rural and high-cost areas should have access to telecommunications services that are priced comparably and that are reasonably comparable to similar services available to

¹ NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents 560 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

² *In the Matter of Federal-State Board on Universal Service Seeking Comment on the Commission's Rules Relating to High-Cost Universal Service Support and the ETC Designation Process*, CC Docket No. 96-45, FCC 03J-1, Public Notice (rel. Feb. 7, 2003) (Public Notice).

consumers in urban areas. Similarly, Section 151 provides that all Americans, so far as possible, should have access to telecommunications services at reasonable charges. Congress expressly stated that the Joint Board should base universal service policies on the principles contained in Section 254(b). Thus, the Board is directed to adopt policies that ensure all consumers the availability of “quality services,” and rural consumers access to telecommunications services that are priced reasonably comparable to those services in urban areas.⁴ Congress included no requirement that universal service support mechanisms should be used to promote competition.⁵

Nonetheless, the “competitive neutrality” principle was adopted in 1997 and it has been cited as the governing rule that justifies so called “portability” rules. When the Joint Board and the Commission adopted the principle they believed that it would lead to competitively neutral rules that would neither advantage nor disadvantage one provider or technology over the other.⁶ NTCA does not quarrel with the principle itself. It believes, however, that the principle has been invoked to override other statutory principles, on the one hand, and, on the other, is only being paid lip service in its application. For example, competition for competition’s sake has become the standard in determining the public interest in rural areas under 47 C.F.R. § 54.201(c).⁷ Rules designed to ensure neutrality no longer have a neutral effect. As shown in Section II, *infra*, identical support rules that arguably level the playing field, in fact, provide windfalls to carriers with lower costs and lesser regulatory burdens. Further, in the name of competitive neutrality, the rules ignore the substance of Section 214(e).⁸

³ 47 U.S.C. §§ 151 and 254.

⁴ 47 U.S.C. §§ 254(b)(1) and (3)

⁵ 47 U.S.C. §§ 254(b)(1)-(7).

⁶ *Federal-State Joint Board on Universal Service, First report and Order*, 12 FCC Rcd 8776, 8801, ¶ 47 (1997).

⁷ *See In the Matter of Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, CC Docket No. 96-45, FCC 01-311 (Oct. 19, 2001).

⁸ *See discussion, infra at Section II.*

Wireless carriers ignore that analysis and argue that the intended use of universal service support is to “promote competition.”⁹ Western Wireless¹⁰ in particular has gone to great lengths to flood the record with testimonials that state the “Act requires universal service policies to promote competition.”¹¹ Western Wireless also cites Section 254(b)(3) of the Act as the source of its position that the Act envisions a competitive “universal service market.”¹² A reading of Section 254(b)(3), however, reveals that the words “require,” and “promote competition” are nowhere to be found.¹³ A thorough reading of the entire Telecommunications Act of 1996 further demonstrates that nowhere in the Act does it state that the Commission, Joint Board or State Commissions are required to adopt policies or rules that promote the use of universal service support to manufacture competition. This misinterpretation of the Act would allow for the improper promotion of artificial competition in rural markets and the inappropriate escalation of the universal service support burden on all consumers.

As demonstrated below, Congress never specifically intended that universal service support be used to promote competition. To the contrary, Congress recognized the distinction between high cost rural and insular areas where special measures are needed to ensure comparable rules and services and other areas served by non-rural telephone companies where special measures were needed to jump start competition. It thus provided for the promotion of

⁹ See, Initial Comments filed by Western Wireless, pp. 1-4, Cellular Telecommunications Internet Association (CTIA), p. 3, Dobson Communications Corporation, p. ii, and Smith Bagley, Inc., pp. 15-16.

¹⁰ Initial Comments of Western Wireless and Attachments A-J.

¹¹ Initial Comments of Western Wireless, Attachment E, p.7.

¹² Initial Comments of Western Wireless, Attachment E., p. 7, footnote 33.

¹³ Section 254(b)(3) states “ACCESS IN RURAL AND HIGH COSTS AREAS – Consumers in all regions of the Nation, including low income consumers and those in rural and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charges for similar services in urban areas.”

competition in these local markets through a variety of mandates that do not include the use of universal service support as a stimulus.

The pro-competition provisions contained in Sections 251, 252, and 253 of the Act provide the FCC and state commissions with a road map for the development of competition in local markets. Section 251 establishes the duties of each telecommunications carrier to open its network to allow competitors to interconnect, purchase unbundled network elements (UNEs), purchase ILEC services on a wholesale basis, collocate, and provide access to rights of way, directory assistance, directory listings, operator services and telephone number portability. Section 252 provides the procedures for ILECs and competitors to negotiate and arbitrate interconnection agreements and other provisions listed in Section 251. Section 253 defined the limits of a state's authority to impose barriers to entry. Nowhere in these sections or in other sections of the Act does Congress require the Commission, or state commissions, to use universal service support to promote competition. The Act expressly provides that the interconnection and unbundling requirements contained in Section 251, coupled with the dispute resolution provisions in Section 252 and the removal of entry barriers provisions in Section 253 are the required tools for the development of competition in local exchange markets.

Moreover, Section 214(e), which sets forth the standards for a state commission to determine whether a carrier is designated a eligible telecommunications carrier (ETC) for purposes of receiving universal service support, also makes no reference to using universal service support to promote competition. Section 214 requires that the carrier requesting ETC designation offer the supported services as defined in the definition of universal service throughout the entire ILEC service territory and advertise the availability of such services. In the case of an area served by a rural telephone company, Section 214(e)(6) requires the state

commission to find the designation is in the "public interest." If Congress had intended to make the "public interest" synonymous with the "interest of competition," it would not have established this additional "public interest" finding. The Act does not, as Western Wireless implies, require that support mechanism be used to create or prop up competition.

The Joint Board should urge the Commission to abandon the misguided notion that the existing implementation of the added "competitive neutrality" principle is the reason that competition is thriving in rural areas. Competition in rural ILEC service areas is not benefiting from the existing scheme.¹⁴ Most rural areas are already served by an average of more than three wireless carriers.¹⁵ Many of these same wireless providers are not ETCs but are providing rural consumers with service at rates comparable to wireless service and rates provided to consumers in urban areas.¹⁶ These carriers have not obtained wireless licenses on the condition that they obtain ETC status or built their business models on the condition of support.

Rules that promote the distribution of support solely in the name of competition will lead to uncontrollable growth in the high-cost universal service fund and the eventual degradation of service quality to consumers living in rural, high-cost areas. Corrective measures are therefore needed to maintain universal service on a going forward basis.¹⁷ Corrective measures must, however, be derived from the standpoint of providing consumers with comparable rates and services. Corrective measures should not be developed from the viewpoint of using universal service support dollars to artificially finance competition in rural areas.

¹⁴ See, Initial Comments of Fred Williamson and Associates, Inc., p. 8, suggesting that support is only adding to the profit margins by certain CETCs.

¹⁵ *Seventh Annual CMRS Competition Report*, 17 FCC Rcd 13,023.

¹⁶ *Seventh Annual CMRS Competition Report*, 17 FCC Rcd 13,025, citing the Econ One Study.

¹⁷ *The Coming Train Wreck in Universal Service*, McLean & Brown, Issue Update, Special Edition, (January 18, 2002); *One Year Later – One Year Closer, The Coming Train Wreck in Universal Service*, McLean & Brown, Issue Update, Special Edition, (January 18, 2003).

II. CHANGES ARE NEEDED TO BRING THE RULES IN COMPLIANCE WITH SECTION 254(e) OF THE ACT

A. There Is Widespread Agreement That Support Should Be Related To The Carrier's cost

In its initial comments, NTCA urged the Joint Board and the Commission to eliminate the “identical support rule.”¹⁸ Absent a cost demonstration, there is no basis to conclude that support distributed to CETCs under the identical support rules will actually result in incremental investment in facilities to provide universal service to consumers in designated rural service areas. The Joint Board and the Commission should therefore eliminate the rule and adopt rules that require all CETCs to demonstrate their costs.¹⁹

A significant segment of the industry agrees with NTCA's position. The National Association of State Utility Consumer Advocates (NASUCA) states that distributing universal service support dollars to CETCs who have not demonstrated their costs fails to enhance the public interest and fails to ensure that public funds are being used for the purposes intended under Section 254.²⁰ The use of the identical support rule puts into question whether the high-cost fund acts as a cost recovery program for high-cost carriers, when CETCs can receive

¹⁸ 47 C.F.R. § 54.307(a)(Allows a CETC to receive the same per-line support as the ILEC, based on the ILEC's costs).

¹⁹ Because CETCs can obtain support without demonstrating their costs and how their support is used, the rule has created an irresistible inducement for wireless carriers to seek CETC status in high-cost areas where they already provide ancillary wireless service to ILEC customers. For example, under the current rule if a rural ILEC's cost of providing service in its service territory is \$50 per month and it receives \$25 per month in support, the rural ILEC can provide service to consumers in its service territory at \$25 per month (e.g., benchmark comparable urban/rural rate). If a CETC in the ILEC's service territory has costs of \$45 per month, under the current rule the CETC receives \$25 per month in support based on the ILEC's costs, not the CETC's costs. If another CETC in the ILEC's service territory has costs of \$25 per month, it too receives \$25 per month in support based on the ILEC's costs. In most instances, CETCs will provide service at, slightly below, or slightly above the \$25 ILEC price. The remainder of support received is then pocketed by the CETCs and used for purposes other than providing universal service in areas the support was intended. As a result, wireless carriers are able to garner universal service support dollars that are in many instances excessive and in clear violation of Section 254(e).

²⁰ National Association of State Utility Consumer Advocates (NASUCA) Initial Comments, p. 11.

universal service funds without ever demonstrating their cost of providing service.²¹ Without knowing a wireless CETC's cost to provide service it is impossible for the Commission to know whether a CETC is over recovering on its costs as a result of receiving excessive universal service support dollars.²² Wireless CETC use of universal service support dollars in this manner directly violates Section 254(e) of the Act, inflates the size of the fund inappropriately, and will significantly increase the burden on consumers.

Providing CETCs support on the basis of ILEC costs enables competitors to seek ETC designation where the support will give them a competitive advantage and the greatest amount of support dollars, *e.g.*, in rural, high-cost areas.²³ When the identical support rule is applied, the disparity between ILEC costs and lower cost CETCs costs skews the economics of providing service in high cost areas.²⁴ This type of regulatory arbitrage results in support going straight to the bottom line of lower cost CETCs and to the benefit of shareholders instead of rural service.²⁵ This observation is supported by a report of the Wall Street investment company Solomon Smith Barney. In its report, Solomon Smith Barney concluded that Western Wireless's "USF subsidy represents an incremental revenue source" where the "incremental revenue is almost all margin."²⁶

Landline CLECs also identify a fundamental problem identical per-line support. Wireless subscribers use wireless service in unpredictable patterns, which roam across the many

²¹ Texas Statewide Telephone Cooperative, Inc., Initial Comments, p. 5; Nebraska Telephone Association Initial Comments, p. 16.

²² Idaho Telephone Association (ITA) Initial Comments, p. 7., ACS of Fairbanks, Inc., (ACS), Initial Comments p. 11.

²³ Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) Initial Comments, p. 13, ACS at 14.

²⁴ ACS at 16.

²⁵ OPASTCO at 15-16.

²⁶ *Id.*, p. 15, Citing *Western Wireless (WWCA): USF Provides Upside to Our EBITDA*, Salomon Smith Barney (Jan. 9, 2003), p. 2.

different boundaries of ILECs with different per-line support amounts.²⁷ Because the Commission's rules allow wireless carriers to use their customer's billing address as a proxy for the subscriber's usage pattern the cost to provide service to a wireless customer has no relationship to the support it receives. The CLECs correctly point out that the identical support rule inappropriately equates wireless subscribers with ILEC subscriber local loops, even though the loop definition in the FCC's rules is plainly not applicable to wireless carriers.²⁸

Several other carriers serving rural, high-cost areas provide additional support for eliminating the identical support rule. They recognize that it is more equitable to base CETC support on their own costs because there is no basis upon which to presume a CETC has the same cost as the ILEC.²⁹ Landline and wireless carriers have fundamentally different cost structures. Landline carriers utilize significant switching and distribution facilities to provide service, while wireless carrier's networks consist of towers and radio equipment. Wireless carriers do not include one of the largest cost components of a landline network – local loops. And, wireless carriers in rural areas for the most part begin providing service in rural areas before being designated CETCs.³⁰ Consequently, requiring wireless CETCs to demonstrate their cost before receiving universal service support should not affect the availability of these services to consumers.³¹

²⁷ Rural Independent Carrier Alliance (RICA) Initial Comments, p. 19.

²⁸ *Id.*, p. 18.

²⁹ Moultrie Independent Telephone Company Initial Comments, p. 6.

³⁰ The Initial Comments of Townes Telecommunications Inc., Golden West Telecommunications Cooperative Inc., Penasco Valley Telephone Cooperative, Inc., Santel Communications Cooperative, Inc., and Venture Communications Cooperative, pp. 6-7.

³¹ Consultants also stress that wireless CETCs must be made to submit their own costs in order to receive support and should be held to similar standards as are applied to ILEC. If not, they claim the designation of multiple CETCs in high-cost areas will dramatically increase the size of the universal service fund, prohibit the Commission from ensuring CETC support is not excessive, and impose an unjustifiable burden on consumers to support the size of the fund. See the Initial Comments of ICORE Companies, pp. 6-7, Beacon Telecommunications Advisors, LLC, p. 7., TCA, pp. 1-3, and Fred Williamson and Associates, Inc., pp. 22-25.

Proponents of the identical support rule assert that regulatory reporting requirements may make it too difficult for CETCs to report their own cost data in a manner similar to the method used by rural ILECs.³² They also claim that it may be “impractical to base the level of USF service support on each carrier’s individual costs.”³³ These unsubstantiated assertions are made in an effort to avoid having to demonstrate CETC costs and to prolong the current and potential windfalls that CETCs receive under the current identical support rule.

Wireless carriers claim that if the Commission requires them to demonstrate their costs, their support amounts would likely exceed the support they would receive under the identical support rule.³⁴ They argue that because they have not fully invested in rural areas, when they do complete their investment in these areas it will likely cost them more than it costs the ILEC to serve some of these areas.³⁵ These speculations are not a good reason to avoid the statutory requirements that support be used for the purposes intended and that it be “explicit” and “sufficient.”³⁶ New rules are needed to ensure that Section 254(e) is implemented in a meaningful way. The existing rule leaves the Commission with no means of determining whether support to CETCs is “sufficient” or used for the purpose intended. A system that bases support on the carriers cost would begin to connect the flaws in the “identical support” rule.

B. The Joint Board Should Determine That Interstate Common Line Support to CETCs is Inappropriate.

The Commission’s rule for disbursing ICLS to CETCs is another application of the identical support rule where ICLS is based on the rural ILEC’s costs. The Commission has no

³² USTA Initial Comments, p. 7.

³³ *Id.* See also, the Initial Comments of CTIA, pp. 6-8, Dobson Communications Corp., pp. 9-10, United States Cellular Comments, p. 5, Rural Cellular Association and the Alliance of Rural CMRS Carriers, pp. 24-26. Smith Bagley, p. 7.

³⁴ Rural Cellular Association and the Alliance of Rural CMRS Carriers, pp. 24-26.

³⁵ *Id.*

³⁶ Section 254(e).

means of determining how unregulated CETCs are using support and whether the support distributed to them complies with sufficiency requirements in Section 254(e). NTCA believes that the Board should recommend that the Commission suspend the distribution of ICLS to CETCs during the pendency of this proceeding.³⁷ If the Board recommends retention of the “identical support” rule, it should at least recommend that the Commission reconsider its decision that ICLS should be made available to CETCs that have no loop costs and no residual revenue requirement attributable to the provision of loops.

In reforming the access rates of RoR carriers, the Commission concluded that ICLS is intended to provide rate-of-return (RoR) carriers with the support needed to meet their residual common line revenue requirements. ICLS is what remains of a RoR carrier’s revenue requirement after recovery of its common line revenue from Subscriber Line Charges (SLCs), other common line end user charges, Long Term Support (LTS), and the transitional carrier common line (CCL) charge to the extent that it remains.³⁸ RoR carriers’ common line revenue requirements are derived from the actual costs of providing loops. These costs are recognized in the interstate jurisdiction through the separations process and accounted for in the carrier common line revenue requirement. In the present environment, existing accounting rules and the maintenance of access tariffs ensure that RoR carriers’ access charges contain common line rate elements that recover these common line costs. Because of the regulatory and accounting

³⁷ See NTCA Petition for Reconsideration filed December 31, 2001 in *In the Matter of the Multi-Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket 00-256; *Federal-State Joint Board on Universal service*, CC Docket 96-45; *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate of Return Regulation*, CC Docket No. 98-77; and *Prescribing the Authorized Rate of Return for Interstate Services for Local Exchange Carriers*, CC 98-166, FCC 01-304, (rel. November 8, 2001) 16 FCC Rcd 19613 (2001).

³⁸ *In the Matter of the Multi-Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket 00-256; *Federal-State Joint Board on Universal service*, CC Docket 96-45; *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate of Return*

requirements, the Commission has the tools necessary to determine that this residual recovery mechanism is still attributable to common line costs attributable to facilities and services used by RoR carriers in the provision of access.

The Commission therefore can enforce Section 254(e) with respect to RoR carriers because the Commission can verify that ICLS in fact is the correct explicit dollar amount that replaces a RoR carrier's revenue requirement formerly embedded and recovered in a per-minute rate. With respect to unregulated CETCs, however, the very fact that ICLS is based on RoR carriers' loop costs and that the mechanism is created to replace an existing RoR carrier rate element makes it impossible for the Commission to determine that CETCs with no loop costs can or are using this support as required by Section 254 (e), *i.e.*, "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."³⁹ In other words, the Commission cannot determine if the amount of ICLS distributed to a CETC is in violation of the Act. The Commission can only guess whether an unregulated CETC is using ICLS for the services "intended" and whether the support is "sufficient."

**C. The Joint Board Should Recommend that CETC'S That Use Rural ILEC
UNEs Should Use Their Own Costs**

Regulation, CC Docket No. 98-77; and *Prescribing the Authorized Rate of Return for Interstate Services for Local Exchange Carriers*, CC 98-166, FCC 01-304, ¶142 (rel. November 8, 2001)(*MAG Order*).

³⁹ Section 254(e) requires that support should be "sufficient" to achieve the purposes of universal service. RoR carrier interstate access charges are based on each RoR carrier's cost of providing interexchange carriers (IXCs) access to their network for the provision of long distance service. ICLS is part of the revenue requirement attributable to a RoR carrier's cost. It is the regulated RoR carrier's cost information that provides the FCC and USAC with the indispensable means to verify and ensure that ICLS is used for the purpose intended and that the "sufficiency" requirement is satisfied with respect to the RoR carrier. The same cannot be said of CETCs that have no common line costs. CETC certification letters do not give the Commission specific information about the CETC's common line cost or for that matter, any specific costs. The Commission cannot determine whether CETC ICLS based on RoR carriers cost is being used "for the provision, maintenance, and upgrading of facilities and services for which the support is intended."

When a CETC leases UNEs from an ILEC to provide local exchange service, the CETC's cost of providing service can be determined easily and should be used. The ILEC UNE price is a state commission approved rate that is typically developed through the use of a forward-looking economic cost (FLEC) proxy model. These FLEC derived UNE rates are typically all the leasing CETC pays to provide service to a customer in an ILEC service territory. In many cases, however, the FLEC-based UNE rates are far below the ILEC's actual costs for providing service to the same customer. The application of the identical support rule and the UNE rate, in many instances, therefore, results in CETCs receiving windfalls that can be used to increase profits or lower rates to uneconomic levels based on the unjustifiable and excessive support received under the identical support rule.

This UNE/identical support combination creates a regulatory arbitrage opportunity that facilitates uneconomic competition and undue pressure on the high-cost universal service fund. NTCA therefore supports the recommendations of others urging the Commission to adopt a rule that requires CETC leasing UNEs to base their support on their own costs.⁴⁰

III. A MEANINGFUL "PUBLIC INTEREST" TEST MUST BE APPLIED TO ETC DESIGNATION PETITIONS IN RURAL AREAS

NTCA supports the many comments urging the Commission to develop a meaningful public interest test when considering an ETC designation petition in rural areas.⁴¹ The public interest test, however, must, in the context of the present definition of federally supported services, consider whether consumers in rural ILEC service areas already have as Section 254

⁴⁰ Initial Comments of ACS of Fairbanks, Inc., pp. 12-21, OPASTCO, p. 21.

⁴¹ Initial Comments of OPASTCO, pp. 39-50, Western Alliance, pp. 8-17, Texas Statewide Telephone Cooperative, Inc., p. 13, Nebraska Telephone Association p. 26-28, GVNW Consulting, pp. 14-16, Fred Williamson and Associates, pp. 17-22, TCA, pp. 3-6, ICORE Companies, pp. 7-11, NASUCA, p. 3, MUST, pp. 29-30, Joint Comments of Townes Telecommunications Inc., Golden West Telecommunications Cooperative Inc., Penasco Valley Telephone Cooperative, Inc., Santel Communications Cooperative, Inc., and Venture Communications

requires, quality services and rates that are comparable to those in urban areas. Under existing rules, every new ETC designation imposes added costs on the fund. A public interest test should consider whether these calculable added costs result in additional benefits contemplated in Section 254(b) and (c). The mere addition of a competitor to the group of ETCs in a given area cannot be the sole measure of the public interest. The test must also weigh the burden that adding an additional ETC in a rural, high-cost area imposes on the sustainability of the fund. The Commission and state commissions have not been “careful enough in ensuring that end users are not ultimately paying extra, not for improvements in service but for forced or artificial competition.”⁴² Quality of service, for example, despite Section 254(b)(1) has been largely ignored in the designation process. The ability of an ETC to provide comparable quality and the range of services envisioned in Sections 254(b)(1) (2) and (3) as well as the definition of universal service in 254(c) need to be considered in the public interest analysis. States may also have unique circumstances that compel specific public interest criteria. When considering the public interest, NTCA supports Commissioner Adelstein’s call for regulators to ask:

whether granting ETC status to a competitor will bring benefits to a community that it does not already have and what effect it will have on the overall size of the fund, and thus on consumers bills. So, a threshold question is, does the benefit to consumers outweigh the ultimate burden on the consumer?⁴³

NTCA also agrees with Commissioner Martin’s recognition that subsidizing multiple competitors in an area that cannot support it “may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in a rural area, leading to

Cooperative, pp. 9-10, Washington Independent Telephone Association, pp. 18-26, Idaho Telephone Association, pp. 9-12, and Alaska Telephone Association, p. 9.

⁴² Remarks of Commissioner Jonathan S. Adelstein, Before the National Association of Regulatory Utility Commissioners (Feb. 25, 2003).

⁴³ *Id.*

inefficient and/or stranded investment and a ballooning universal service fund.”⁴⁴ The Commission and state commissions should require a thorough consideration these factors when applying of the public interest test for purposes of designating potential CETCs in rural ILEC study areas.

IV. THE JOINT BOARD SHOULD USE THIS OPPORTUNITY TO PROMPTLY MAKE RECOMMENDATIONS ON SUBSTANTIVE RULE CHANGES

Wireless carriers and their associations are urging the Joint Board and Commission to assemble a task force to establish “a competitive universal service support mechanism in rural telephone company areas.”⁴⁵ The apparent task of this group would be to reach a consensus that can be submitted to the Joint Board. The urgency to implement new universal service portability rules and regulatory procedures for ETC designations is too great to await the lengthy process that would be required to reach a consensus on the issues in this proceeding. The original Rural Task Force recommendation took two years before the recommended decision was submitted to the Joint Board and the Commission for review. It then took almost another year for the Commission to issues its order on the RTF recommendation. The *status quo* during the pendency of the RTF deliberations did not pose the problems inherent in this proceeding. Existing rules are not having an indifferent impact on discrete concerned parties. There is an urgency which requires that the Joint Board move forward with recommendations as quickly as possible. The Board, moreover, has the benefit of experience with the rules at the state and federal level. It is capable of creating a record and gathering enough information to discern where present rules are not working or are out of line with the statute. A delay in establishing remedial measures will only further distort the economics of providing service in rural areas,

⁴⁴ Separate Statement of Commissioner Kevin J. Martin in the *MAG Order*.

⁴⁵ Western Wireless Initial Comments, pp. 15-16.

prolong uncertainties and erode the long term sustainability of universal service support mechanisms. The Joint Board and the Commission should not wait for a task force recommendation to begin to take the steps needed to preserve the long term goals of the Act.

V. THE VAST MAJORITY OF THE INDUSTRY AGREES THAT SUPPORT SHOULD BE USED FOR ALL LINES, PRIMARY AND SECONDARY

The vast majority of the telecommunications industry, including Verizon, Sprint, MCI, NTCA, OPASTCO, USTA, Western Wireless, CTIA, Rural Cellular Group (RCG), Dobson Communications, Rural Independent Carrier Association (RICA), Montana Universal Service Task Force (MUST), Idaho Telephone Association, Washington Independent Telephone Association, Texas Statewide Telephone Cooperative Inc., Alaska Telephone Association, Montana Telecommunications Association, Nebraska Rural Independent Telephone Companies, and GVNW Consulting recommend that universal service support should apply to all lines, primary and secondary. The small minority, including SBC, AT&T, and GCI, oppose providing support to secondary lines. They claim that limiting support to primary lines will control the growth of the fund.⁴⁶ They further argue that providing support to secondary lines is inconsistent with the goals of universal service - providing rural consumers access to telecommunications services and rates that are comparable to services and rates received by urban consumers. They are wrong on both counts.

Limiting support to primary lines will not assist the Commission in controlling the size of the universal service fund. Rural ILECs are rate-of-return regulated and any reduction in support as a result of the elimination of secondary line support would correspondingly result in increase in primary line support to allow these carriers the ability to recover their lawfully approved investments in total network facilities. In addition, if the Commission does not eliminate the

identical support rule, CETCs would also receive higher amounts of per-line support based on the rule. To control the size of the fund, the Board should recommend that CETCs support be based on their own costs, that the public interest test for CETC designations be strengthened, and that the Commission refocus its attention to the universal service principles in Section 254(b)((1) through (6).

Section 254(b)(3) provides that consumers should have access to comparable telecommunications and information services.”⁴⁷ The Act does not limit the amount or types of services that may be supported by universal service. It is well within the Commission authority to allow universal service support to include multiple lines to a customer. Indeed, the Commission has previously exercised this authority in its First Report and Order on Universal Service and in its Order on the Rural Task Force Recommendation.⁴⁸

Sections 254(e) and 254(b)(3) also directs the Commission to allow carriers to use universal service support for infrastructure investment in areas where it would not be economically feasible to provide services and rates that are comparable to rates and services in urban areas. The emphasis in these two sections is to build, maintain and upgrade telecommunications facilities to provide consumers in high-cost areas with comparable services. The Act, therefore, recognizes that lines, *per se*, are neither built nor operated in isolation from the total facilities used to provide the panoply services. Comparability would be adversely affected by limiting support to isolated lines. Distributing support based on the cost of the total network will ensure comparable rates and services while providing certainty for all carriers that they have a

⁴⁶ SBC Initial Comments, p. 13.

⁴⁷ 47 U.S.C. §254(b)(3)(emphasis added).

⁴⁸ See, *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157, First Report and Order, at ¶ 47 (rel. May 8, 1997), and *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket 96-45, *Multi-State Group (MAG) Plan for the Regulation of Interstate Services of Non-Price*

reasonable opportunity to recover their costs.⁴⁹

Rationing support to anything less than total network facilities will halt future investment to modernize the telecommunications infrastructure in rural America and jeopardize the ability of rural carriers to service debt for plant facilities already constructed and lawfully approved by regulators. As Commissioner Copps recognizes:

[i]t is essential, that any regime we adopt increase certainty so that rural carriers can plan for the future and undertake necessary investment to modernize the telecommunications infrastructure in their communities.⁵⁰

Limiting support to primary lines only would also be extremely burdensome on small businesses operating in rural areas. Small business generally have less than five lines, therefore, if support is limited to only one line, these business will be forced to pay higher rates for their telecommunications services in high-cost areas than they would pay in urban areas.⁵¹ As a result, the higher cost of doing business in rural areas will limit or halt small business investment in those areas.⁵²

Lastly, insufficient universal service support threatens the ability of rural ILECs to offer advanced services to their customers, schools, libraries, and health care facilities. Considering the Act's goal of preserving and advancing universal service to ultimately provide consumers access to advanced telecommunications and information services, such a result would be completely at odds with the intent of Section 254.

VI. THERE IS AGREEMENT THAT RURAL ILEC SUPPORT SHOULD CONTINUE TO BE BASED ON EMBEDDED COST

Cap LEC Incumbent Local Exchange Carriers and Interexchange Carriers, CC Docket No. 00-256, FCC 01-157 (rel. May 23, 2001)(RTF Order).

⁴⁹ OPASTCO Initial Comments, pp. 32-33.

⁵⁰ *MAG Order, Dissenting Statement of Commissioner Michael J. Copps*.

⁵¹ USTA Initial Comments, p. 6.

⁵² *Id.*

Several parties urge the Board to recommend that rate-of-return regulated rural ILECs continue to recover their investment in the total network facilities needed to provide comparable rates and services to consumers living in rural and high cost areas.⁵³ Support for the existing methodology is based on the fact that these investments have been lawfully approved and have enabled the Commission to achieve its mandate of ensuring that rural consumers have access to telecommunications services at prices that are comparable to similar services and prices received by urban consumers.⁵⁴

Western Wireless proposes that the Commission establish a forward-looking economic cost (FLEC) proxy model for determining the costs of rural ILECs and wireless CETCs for purposes of determining universal service support. NTCA opposes the blanket application of a FLEC proxy model to over 1000 rural ILECs and believes that it could be fruitless to apply resources to rejuvenate a proxy model and applies across the board. As demonstrated by the Rural Task Force (RTF), one-size fits all FLEC proxy model fails to account for the diversity among rural carriers, their varying operating conditions and much of the costs already incurred in the build-out of rural ILEC networks throughout the country.⁵⁵ The RTF further determined that a FLEC model “will not produce a sufficient universal service mechanism for Rural Carriers that is in the public interest and consistent with the principles of the 1996 Act.”⁵⁶

Moreover, if a hypothetical FLEC proxy model were applied to rural ILECs, many rural carriers would receive less support than they would under the current embedded cost methodology. If portion of a rural ILEC’s costs are no longer recovered through universal

⁵³ See the Initial Comments of NTCA, pp. 3-8, OPASTCO, pp. 11-20, USTA, pp. 5-7, RICA, pp. 20-25, Texas Statewide Telephone Cooperative, pp. 6-9, Minnesota Telecommunications Association, pp. 6-7, MUST, pp. 36-37, Moultrie Independent Telephone Company, pp. 7-9.

⁵⁴ NTCA Initial Comments, pp. 3-8.

⁵⁵ *Id.*

service, and an alternative regulatory cost recovery method is not made available or prohibited by regulators, then these cost will become stranded investment unless rates are raised beyond comparable levels. Insufficient support poses the threat of unlawfully high rates on threats to the ability of rural ILECs to offer supported services and advanced services to consumers, schools, libraries, and health care facilities. Either result would be contrary to the Act and would lead to a digital divide that currently does not exist in most rural ILEC service territories.

NTCA does not oppose using default mechanisms such as a FLEC proxy model or an embedded cost model to determine the costs of wireless carriers. Consistent with its recommendation to eliminate the identical support rule, NTCA supports the requirement that wireless carriers demonstrate their costs to determine whether they should receive support and at what level. NTCA urges the Commission to decide what the appropriate cost methodology should be used for determining wireless CETC costs for purposes of receiving universal service support.

There is no valid reason why rural ILECs are required to justify their costs and wireless CETCs are not. As Commissioner Abernathy acknowledges:

Requiring incumbent LECs, but no one else, to comply with costly regulations and to open their books to competitors raises obvious questions of competitive neutrality.⁵⁷

⁵⁶ *In the Matter of the Federal-State Joint Board on Universal Service*, Rural Task Force Recommendation to the Federal-State Joint Board on Universal Service, CC Docket No. 96-45, (rel. Sept. 29, 2000)(RTF Recommendation).

⁵⁷ Separate Statement of Commission Kathleen Q. Abernathy, Report and Order in CC Docket Nos. 00-199, 97-212, and 80-286, Further Notice of Proposed Rulemaking in CC Docket Nos. 00-199, 99-301, and 80-286, FCC 01-305, *In the Matter of 2000 Biennial Regulatory Review – Comprehensive Review of Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase 2, Amendments to the Uniform System of Accounts for Interconnection, Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Local Competition and Broadband Reporting*, p. 2 (rel. November 5, 2001).

Requiring wireless carriers to demonstrate their costs will greatly enhance the Commission's ability to ensure that support distributed to wireless CETCs is not excessive and ensure that support is used for the purposes intended as required by Section 254(e).

VII. RURAL ILEC SUPPORT SHOULD NOT BE FROZEN UPON COMPETITIVE ENTRY

The Joint Board should dismiss claims that support should be frozen upon entry of a CETC in a given study area.⁵⁸ The Act requires that federal funding be "sufficient" to allow carriers to use support for the purposes intended under Section 254(e). Freezing support on a per-line-basis is arbitrary and would threaten the sufficiency of support available to rural carriers and their ability to meet universal service needs of the future. A freeze leaves no room for changes that could develop as the definition of universal service evolves. It contemplates that a static network is all that is needed in a world where technology is changing rapidly. The Joint Board should recommend against a per-line freeze on CETC entry.

A per-line freeze on high-cost support would also require the Commission to implement complex and administratively burdensome regulations. The Commission would have to impose new reporting requirements on rural carriers to implement frozen per-line support based on cost data and line count data for the 12 months prior to the quarter in which the CETC initiates service.⁵⁹ Despite the fact that support would be frozen rural ILECs would have to continue to file annual cost data.⁶⁰ In addition, new administrative requirements and procedures would be necessary for all rural ILECs to request increased support to recover the cost of catastrophic events effecting their ability to provide supported services.⁶¹ To verify the need and eligibility of

⁵⁸ Verizon Initial Comments, pp. 3-4.

⁵⁹ RTF Recommendation, ¶127.

⁶⁰ *Id.*

⁶¹ *Id.*

increased support the Commission would have to impose additional reporting requirements on rural ILECs, or adopt potentially cumbersome procedures for state certification.⁶²

Freezing support would threaten future investment in rural infrastructure and undermines the fundamental goal of universal service. Rural ILECs would have a reduced incentive to invest in infrastructure because they will be unable to obtain additional support for such investments once high-cost loop support is frozen. Frozen support would also provide the wrong incentive to CETCs because CETC support would be frozen no matter how many lines or customers they serve in the rural ILEC's study area. Carriers in high cost areas should therefore have access to a funding mechanism that meets the law's requirements for sufficient support and that allows for reasonably comparable rural and urban rates and services.

VIII. AT&T'S PROPOSAL TO LIMIT ILEC RECOVERY OF LOST SUPPORT THROUGH INCREASED SUBSCRIBER LINE CHARGES (SLCs) SHOULD BE REJECTED

The Joint Board and the Commission should reject AT&T proposal to limit any recovery of ILEC lost revenues through increases in subscriber line charges (SLCs).⁶³ High-cost universal service support is a cost recovery mechanism that allows rural carriers to provide consumers in rural communities with services and rates comparable to urban consumers. Shifting any lost universal service support into higher rural consumer SLCs would result in rural consumers paying higher, and in many cases non-comparable rates, for similar services received by urban consumers. This would be contrary to the intended purpose of universal service. The Joint Board and Commission therefore should keep all options open concerning the recovery of ILEC costs, including explicit support, carrier-to-carrier per-minute access charges, and carrier-to-

⁶² *Id.*

⁶³ AT&T Initial Comments, p.p. 24-27

carrier flat-rate charges so that it can ensure that the new rules will provide rural and urban consumers with access to comparable rates and services.

IX. AUCTIONS SHOULD BE REJECTED

The object of high-cost support is to ensure that consumers in rural areas receive comparable services to those received by urban consumers and that they are able to obtain those services at comparable rates. A system that limits support to the lowest bidder is highly unlikely to achieve this objective and ensure that the goals of the Act will be consistently achieved throughout the United States. Many agree.⁶⁴

Support to the lowest bidder is also inconsistent with the notion that companies must invest in networks to maintain service and that the evolution of the definition of universal service requires additional and timely investment in new technologies. The Commission's experience with competitive bidding for spectrum licenses demonstrates that the speculative nature of auctions has the potential to create years of uncertainty for licensees and the public. Highly erratic, competitive bidding is at odds with an Act that requires "specific, predictable, and sufficient"⁶⁵ support mechanisms. Auctions should therefore be rejected.

X. THE BOARD SHOULD RECOMMEND A STAY ALL PENDING ETC DESIGNATION PETITIONS UNTIL NEW RULES ARE ADOPTED AND IMPLEMENTED

A stay of all pending ETC designations until new portability rules and ETC designation guidelines are adopted is consistent with Section 254. A stay would avoid the potential for further non-compliance with Section 254(e). The escalation in requests for ETC designations

⁶⁴ Initial Comments of OPASTCO, pp. 27-31, MUST, pp. 33-34, Western Alliance, p.p. 20-21, Texas Statewide Telephone Cooperative, Inc., p. 13, Montana Telephone Association, pp. 7-8, Nebraska Telephone Association pp. 16-17, GVNW Consulting, p.p. 14-16, Fred Williamson and Associates, pp. 17-22, TCA, pp. 3-6, ICORE Companies, pp. 7-11, NARUC p. 3, MUST, pp. 33-34, and Alaska Telephone Association, p. 18-21.

⁶⁵ 47 U.S.C. § 254(b)(5).

demonstrate that some type of abatement is needed while this proceeding is pending. Support to CETCs has jumped from \$500,000 in 1999 to a projected \$140 million in 2003.⁶⁶ On a percentage basis, the number of CETCs eligible to receive high-cost support has grown 1200% between 1st quarter 2000 and 2nd quarter 2003.⁶⁷ Meanwhile, CETCs that have loop costs are now filing line counts and certifications indicating that they are complying with 254(e) when they use access support intended to replace an ILEC residual revenue requirement. In May 2003, the Universal Service Administrative Company (USAC) issued a report showing that the number of study areas where CETCs will receive support will more than tripled between 2nd and 3rd quarter 2003.⁶⁸ NECA projects that CETC support amounts could increase by \$395 million dollars as soon as 2006.⁶⁹ This rapid escalation considered together with the pending proceedings on changes in the assessment of contributions warrants an interim stay.

⁶⁶ *In the Matter of "The Future of Universal Service"* Statement by Robert Orent, President and CEO of Hiawatha Communications on behalf of the Independent Telecommunications Alliance (ITTA), National Rural Telecom Association (NRTA), National Telecommunications Cooperative Association (NTCA), Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) and the Western Alliance before the United States Senate Committee on Commerce, Science, & Transportation Subcommittee on Communications, p. 2 (April 2, 2003).

⁶⁷ USAC's First Quarter 2000 Appendices, High Cost Support Projected by State by Study Area - 1Q2000. and USAC's Second Quarter 2003 Appendices, High Cost Support Projected by State by Study Area - 2Q2003.

⁶⁸ USAC's Third Quarter 2003 Appendices, High Cost Support Projected by State by Study Area - 3Q2003. and USAC's Second Quarter 2003 Appendices, High Cost Support Projected by State by Study Area - 2Q2003.

⁶⁹ Trends in Telecommunications Cost Recovery: *The Impact on Rural America*, Table C-3 (October 2002)

XI. CONCLUSION

Based on the above reasons, NTCA urges the Board to recommend changes to the universal service portability rules and ETC designation process. The new rules at a minimum should require the elimination of the identical support rule and the establishment of a cost methodology for determining CETC costs modification of ETC designation procedures to ensure compliance with Sections 254 and 214(e)(6).

NTCA also urges the Board to recommend the interim stay of all pending ETC designation petitions and the ICLS portability rules until the new rules are implemented.

Respectfully submitted,

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

By: /s/ L. Marie Guillory
L. Marie Guillory

By: /s/ Daniel Mitchell
Daniel Mitchell

By: /s/ Jill Canfield
Jill Canfield

Its Attorneys
4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
(703) 351-2000

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Reply Comments of the National Telecommunications Cooperative Association in CC Docket No. 96-45, FCC 03J-1 was served on this 3rd day of June 2003 by first-class, U.S. Mail, postage prepaid, to the following persons.

/s/ Gail C. Malloy

Gail C. Malloy

Chairman Michael Powell
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, D.C. 20554

Commissioner Jonathan Adelstein
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554

Qualex International Portals II
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554

Michael F. Altschul, Esq.
Randall S. Coleman, Esq.
Cellular Telecommunications & Internet
Association
1250 Connecticut Ave., NW, Suite 200
Washington, DC 20036

Ronald L. Ripley, Esq.
Vice President & Sr. Corporate Counsel
Dobson Communications Corporation
14201 Wireless Way
Oklahoma City, OK 73134

David A. LaFuria, Esq.
Steven M. Chernoff, Esq.
Lukas, Nace, Gutierrez & Sachs
1111 19th Street, NW
Suite 1200
Washington, D.C. 20036

Michele C. Farquhar, Esq.
David L. Sieradzki, Esq.
Hogan & Hartson
555 13th Street, NW
Washington, D.C. 20004-1109

Mark S. Rubin, Director of Federal
Government Affairs
Western Wireless Corporation
401 9th Street, NW, Suite 550
Washington, D.C. 20004

Gene DeJordy, Vice President of Regulatory
Affairs
James Blundell, Director of External Affairs
Western Wireless Corporation
3650- 131st Ave. SE, Suite 400
Bellevue, WA 98006

Frederic G. Williamson
Fred Williamson & Associates, Inc.
2921 E. 91st Street, Suite 200
Tulsa, OK 74137

Wayne R. Jortner, Senior Counsel
Maine Public Advocate
112 State House Station
Augusta, ME 04333

NASUCA
8300 Colesville Road, Suite 101
Silver Spring, MD 20910

Paul M. Schudel, Esq.
James A. Overcash, Esq.
Woods & Aitken, LLP
301 South 13th Street, Suite 500
Lincoln, Nebraska 68508

Conley Ward, Esq.
Givens Pursley, LLP
P.O. Box 2720
Boise, Idaho 83701-2730

Stuart Polikoff, Director of Government
Relations
OPASTCO
21 Dupont Circle, NW, Suite 700
Washington, D.C. 20036

David Cosson, Esq.
Clifford C. Rohde, Esq.
Kraskin, Lesse & Cosson, LLP
2120 L Street, NW, Suite 520
Washington, D.C. 20037

David A. Irwin, Esq.
Loretta J. Garcia, Esq.
Irwin Campbell & Tannenwald, PC
1730 Rhode Island Avenue, NW
Washington, D.C. 20036

Benjamin H. Dickens, Jr., Esq.
Mary J. Sisak, Esq.
Blooston, Mordkofsky, Dickens, Duffy &
Prendergast
2120 L Street, NW, Suite 300
Washington, D.C. 20037

Jan F. Reimers, President
ICORE, Inc.
326 S. 2nd Street
Emmaus, PA 18049

Paul M. Hartman
Beacon Telecommunications Advisors, LLC
8801 South Yale Avenue, Suite 450
Tulsa, OK 74137

TCA, Inc. – Telcom Consulting Associates
1465 Kelly Johnson Blvd., Suite 200
Colorado Spring, CO 80920

Lawrence E. Sarjeant, Esq.
Indra Sehdev Chalk, Esq.
Michael T. McMenamin, Esq.
United States Telecom Association
1401 H Street, NW, Suite 600
Washington, D.C. 20005

Peter M. Connolly, Esq.
Koteen & Naftalin, LLP
1150 Connecticut Avenue, NW
Suite 1000
Washington, D.C. 20036

James Jenkins
Vice President - External Affairs
United States Cellular Corporation
8410 West Bryn Mawr
Chicago, IL 60631

David L. Nace, Esq.
Lukas, Nace, Gutierrez & Sachs, Chartered
1111 19th Street, NW, Suite 1200
Washington, D.C. 20036

Jeffrey H. Smith, Consulting Manager
GVNW Consulting, Inc.
P.O. Box 2330
Tualatin, OR 97062

Karen Brinkmann, Esq.
Elizabeth R. Park, Esq.
Latham & Watkins
555 11th Street, NW, Suite 1000
Washington, D.C. 20004

Leonard A. Steinberg, General Counsel
Alaska Communications Systems Group,
Inc.
ACS of Fairbanks, Inc.
600 Telephone Avenue
Anchorage, Alaska 99503

Christopher M. Heimann, Esq.
Gary L. Phillips, Esq.
Paul K. Mancini, Esq.
SBC Communications, Inc.
1401 Eye Street, NW, Suite 400
Washington, D.C. 20005

John T. Nakahata, Esq.
Michael D. Nilsson, Esq.
Harris, Wiltshire & Grannis LLP
1200 Eighteenth Street, NW, Suite 1200
Washington, D.C. 20036

Leonard J. Cali, Esq.
Lawrence J. Lafaro, Esq.
Judy Sello, Esq.
AT&T Corp.
One AT&T Way, Room 3A229
Bedminster, NJ 07921

Michael C. Strand, Esq.
Montana Universal Service Task Force
P.O. Box 5237
Helena, MT 59604-5237